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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. RUANI OMAR CERRITOS, Defendant and Appellant.	2d Crim. No. B264812 (Super. Ct. Nos. VA110437) (Los Angeles County)

In 2009, appellant and two co-defendants, Guillermo Rodriguez (Guillermo) and Anthony Rodriguez (Anthony), were charged with two counts of second degree robbery (Pen. Code, § 211)[1] and one count of assault by means likely to produce great bodily injury (§ 245, subd. (a)(1)). It was alleged that the crimes were committed for the benefit of, at the direction of, and in

[1] All further statutory references are to the Penal Code unless otherwise stated.

association with a criminal street gang. (§ 186.22, subds. (b)(1)(B), (b)(1)(C).)[2]

Pursuant to a plea agreement, appellant pled no contest to one count of second degree robbery. The other two counts were dismissed. On March 3, 2010, the trial court sentenced appellant to the upper term of five years in state prison, but suspended execution of the sentence. Appellant was placed on probation for five years, on the condition that he serve 365 days in county jail. He was awarded 426 days of presentence custody credit.

Between 2011 and 2014, the trial court revoked and reinstated appellant's probation three times for various probation violations. Following a fourth violation, the court terminated probation and imposed the previously suspended sentence of five years in state prison. Appellant contends the court abused its discretion in sentencing him to prison instead of reinstating his probation. We affirm.

FACTS AND PROCEDURAL BACKGROUND

Underlying Offense

On May 2, 2009, Edgar J. and his cousin, Erick F., were walking home from a church fair in Whittier when they were approached by appellant, Guillermo and Anthony. The three men said they were from the Southside Whittier gang and asked Edgar if he had money or a phone. Anthony reached into Edgar's pockets, pulled out a phone and put it in his pocket. Guillermo grabbed Edgar, pushed him onto a truck and hit him in the face. Anthony then searched Erick's pockets and took his

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[2] The case (No. VA110438) was consolidated with another case (No. VA110437), which charged Anthony with the assault and robbery of a different victim on the same day.

phone. Appellant was "standing kind of surrounding" the victims during the incident.

Edgar told his cousin, Jorge Nava, and his uncle, Oscar Flores, about the incident. Edgar, Nava and Flores went to the church fair to try to get the phones back. They found appellant, Guillermo and Anthony with two other people. As Edgar and Nava approached, appellant, Guillermo and Anthony lunged at them and a fight ensued. Security broke up the fight. When someone in the fight pushed Nava, a cell phone fell to the ground. Nava opened the phone and saw a picture of his cousin. Edgar identified appellant, Guillermo and Anthony as the men who took his phone. A responding deputy found Edgar's phone in appellant's right pocket.

At the preliminary hearing, Deputy Gina Kolowski of the Los Angeles County Sheriff's Department testified as a designated expert on gangs and gang cultures. She testified that Southside Whittier is a street gang that primarily engages in robberies and whose territorial border includes the church. Deputy Kolowski opined that Anthony was a Southside Whittier member, that Guillermo was an associate, and that appellant also associated with the gang. In response to a hypothetical based on the robbery and assault in this case, Deputy Kolowski testified that the crimes would have been committed for the benefit of, at the direction of, or in association with Southside Whittier.

On March 3, 2010, appellant pled no contest to one count of robbery. He admitted that he "acted as back up or, essentially, muscle [to] aid[] and abet[] [the] robbery." He stated he did not take the cell phone or strike anyone during the two incidents. He was "simply helping in the robbery."

While taking appellant's plea, the trial court advised: "The maximum confinement time on this charge is five years in prison. In this case you're going to jail for a year. The state prison [sentence] is suspended. If you violate you could go back to the county jail to do more time or go to prison for up to the maximum time." When asked if he understood "those consequences of [his] plea," appellant responded, "Yes, Sir." Appellant was 18 years old at the time, had no tattoos or gang markings and no prior criminal record.

First Probation Violation

On February 4, 2011, Commissioner Michael L. Schuur granted the People's request to revoke probation after appellant was arrested for "tagging" walls with the gang moniker "SSW" (§ 594, subd. (a)(1), (b)(1)). Appellant admitted the violation. On March 15, 2011, Commissioner Schuur reinstated probation, ordered appellant to serve 30 days in jail and credited him with 30 days in custody.

Second Probation Violation

On May 25, 2011, the trial court made "a preliminary finding that the defendant is in violation of probation and order[ed] probation revoked." On June 21, 2011, Judge James Horan found appellant in violation of probation for (1) resisting arrest at a party and (2) failing to update his address with the probation department. He determined, however, that the violations "are so tiny that, to me, they are virtually de minimis." The failure to submit lasted seven seconds and it was a "largely technical" failure to update probation with his address. Nonetheless, Judge Horan struggled with the decision of whether to reinstate probation. One the one hand, he was "fully aware that if I give [appellant] the jail time, about exactly four years

from now he's going to come out a full, hard criminal, still in a gang, and much more in the gang than he is now. So this is the end of his life if he goes, his reasonable, productive, decent life." On the other hand, Judge Horan was "worried if I don't [give him jail time], he is everything he's decided that he wanted to be when he was much younger."

Following a contested hearing on July 15, 2011, Judge Horan sentenced appellant to one year in county jail, reinstated probation, extended probation to five years from July 15, 2011, and prohibited appellant from going to Whittier for any reason other than visiting his probation officer. Appellant waived all back time credits. Judge Horan stated his belief that appellant was a member of Southside Whittier and that he was maintaining a lifestyle of "hanging out late at night." Appellant also had made only one $10 restitution payment in the past year. Mitigating factors included appellant's attendance at school, his employment and his "relatively small" role in the underlying robbery. Appellant did not appeal Judge Horan's ruling.

Third Probation Violation

On June 5, 2014, appellant's probation officer reported that appellant had failed to report as directed in April 2013, October 2013, December 2013, February 2014, April 2014 and March 24, 2014. When appellant reported on March 3, 2014, he said he was unemployed and supported by his mother. The officer recommended that the trial court add 30 days of community service or probation adult alternative work service (PAAWS) to the terms of his probation. After appellant appeared on June 19, 2014, and admitted the probation violation, Judge Roger Ito revoked and reinstated probation under the same terms and conditions. Judge Ito, however, admonished appellant to

"[m]ake sure you're reporting regularly. You can't have another one of these, okay[?] If you fail to report, if you think that the reason why you're going to get violated is because you're not paying the fines, you're wrong. You're going to get violated if you don't show up to probation, for not reporting." Judge Ito also noted that appellant had five years suspended, "which means you can't mess up like this, like not coming to court on time and not reporting to probation regularly."[3]

Fourth Probation Violation

On March 30, 2015, appellant's new probation officer, Danielle Daidone, recommended that probation be revoked due to appellant's failure to keep one appointment in January 2015 and two appointments in March 2015. On May 12, 2015, Officer Daidone reported that appellant also failed to report for appointments in February 2015 and September 2014. She noted that appellant had support from family and friends but had failed to take advantage of that support.

At the hearing on May 19, 2015, appellant reiterated that he had not been convicted of another crime since his placement on probation and was only months away from its completion. Appellant's counsel conceded that "there's no excuse" for appellant's failure to report, but explained that appellant was enrolled in school and found it difficult to report and maintain his class schedule. Judge Michael A. Cowell was inclined to revoke probation, stating "The fact of the matter is, Mr. Cerritos, the

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[3] The transcript of the probation violation hearing before Judge Ito on June 19, 2014, is not part of the record on appeal. We obtained the original transcript of that hearing from the superior court's file and have taken judicial notice of the transcript. (Evid. Code, §§ 452, subd. (d), 459.)

only thing between you and state prison is the extent to which you comply with the conditions of probation. You have a prison sentence. Do you understand that? You've been sentenced. And the only reason you're out is because the court has not once, not twice, but three times given you the opportunity to comply with the conditions of probation." Appellant requested a contested hearing.

During the hearing on June 3, 2015, Officer Daidone testified that appellant reported to her every month between October 2014 and January 2015, but failed to report in February 2015. She stated she reviewed appellant's probation history with him and explained the importance of complying with his terms and conditions to avoid future violations. When appellant failed to report in February 2015, Officer Daidone tried calling family members and two other numbers that appellant had given as contact numbers. She left a message with appellant's brother, but appellant did not respond to that message. On March 17, 2015, appellant appeared without an appointment and said he had failed to report because he was busy with school.

Judge Cowell found that appellant had violated the terms of his probation, revoked probation and imposed the previously suspended sentence of five years in prison, with 414 days of credit for time served. Judge Cowell "agree[d] that five years in state prison for not reporting is excessively harsh," but noted "[appellant's] not getting five years in state prison for failing to report. He's getting five years in state prison for the crime of robbery, for which he pled." Judge Cowell observed that appellant "received an enormous break when he got a grant of probation in the first place. The problem is the court by extending continued leniency creates a situation where the

probationer comes to believe I don't have to listen to this." Judge Cowell further emphasized that after the third probation violation, Judge Ito "made clear to [appellant] as many times as possible that if he doesn't report he's going to go to prison." Appellant appeals Judge Cowell's order.

DISCUSSION

Effect of Section 1203.1, Subdivision (a)

Section 1203.1, subdivision (a) provides that where, as here, "the maximum possible term of the sentence is five years or less, then the period of suspension of imposition or execution of sentence may, in the discretion of the court, continue for not over five years." (See *In re Bolley* (1982) 129 Cal.App.3d 555, 557 ["A court cannot establish a period of probation longer than the maximum period of imprisonment for the offense involved. . . . Any attempt to do so is null and void"]; *People v. Gilchrist* (1982) 133 Cal.App.3d 38, 44 ["If defendant's period of probation was five years' maximum, any attempt by the Los Angeles court to extend probation beyond that period would be null and void even [if] he consented"].)

At our request, the parties provided supplemental briefing on "whether the trial court, as of June 3, 2015, had authority to revoke appellant's probation and to impose the existing suspended sentence or whether the time to do so had expired." The People concede in that briefing that the trial court lacked authority under section 1203.1, subdivision (a) to impose a new maximum probation term of five years on July 15, 2011, and that the order, issued by Judge Horan, was "null and void" and could have been successfully attacked on appeal from that order. (*In re Bolley*, *supra*, 129 Cal.App.3d at p. 557.) The People argue, however, that we lack appellate jurisdiction to consider

appellant's challenge to the 2011 extension of the probation term. They contend the challenge is untimely because the 2011 order modifying the terms of probation was an appealable order. They cite *People v. Ramirez* (2008) 159 Cal.App.4th 1412 (*Ramirez*) for the proposition that "an appealable order that is not appealed becomes final and binding and may not subsequently be attacked on an appeal from a later appealable order or judgment. [Citations.] Thus, a defendant who elects not to appeal an order granting or modifying probation cannot raise claims of error with respect to the grant or modification of probation in a later appeal from a judgment following revocation of probation. [Citations.]" (*Id.* at p. 1421.)

In *Ramirez*, the trial court sentenced the defendant in 2003 to four years in state prison, suspended execution of the sentence, and placed him on probation. (*Ramirez*, *supra*, 159 Cal.App.4th at p. 1417.) In 2004, the defendant admitted a probation violation as part of a plea agreement that allowed him to remain on probation but increased his previously imposed, unexecuted sentence from four to five years. In 2006, the court found that the defendant had violated the terms of his probation, terminated his probation and ordered him to serve the five-year prison term that had been imposed but suspended in 2004. (*Ibid.*)

The court of appeal concluded the trial court exceeded its authority by increasing the defendant's sentence, but determined he was not entitled to relief. (*Ramirez*, *supra*, 159 Cal.App.4th at p. 1417.) First, it ruled that because he had agreed to the increased sentence as part of a plea bargain, the defendant could not complain that the court exceeded its jurisdiction by imposing the modified sentence. Second, and

more importantly, it determined "his challenge is untimely because he did not appeal from the order imposing the increased sentence." (*Ibid.*) The court stated: "The trial court's order of December 17, 2004, which modified the terms of probation and imposed but suspended execution of an increased sentence, was plainly an appealable order. [The defendant] does not contend otherwise. To the extent [he] challenges the December 2004 order modifying the terms of his probation and sentence, he should have raised those claims in a timely appeal from that order. He did not do so. As a consequence, his challenge to the December 2004 order appears to be untimely." (*Id.* at p. 1421; see *In re Bolley*, *supra*, 129 Cal.App.3d at p. 557, fn. 1 ["The imposition of a sentence for which there is no statutory authority is jurisdictional error, subject to correction on appeal"].)

We conclude, therefore, that appellant's remedy under section 1203.1, subdivision (a) was to appeal the 2011 order extending his probation period. (*Ramirez*, *supra*, 159 Cal.App.4th at p. 1421.) Appellant has provided no authority suggesting we have jurisdiction to overturn the 2011 order in the current appeal.

No Abuse of Discretion

Appellant asserts that Judge Cowell abused his discretion when he revoked appellant's probation and sentenced him to prison. We disagree.

A grant of probation is an "act of clemency and grace," and in granting it, the court risks that the probationer may "commit additional antisocial acts." (*People v. Rodriguez* (1990) 51 Cal.3d 437, 445 (*Rodriguez*).) Accordingly, probation is generally reserved for those convicted criminals whose "conditional release into society poses minimal risk to public

safety and promotes rehabilitation." (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) And, in granting probation, courts have broad discretion to impose conditions to foster rehabilitation and protect public safety. (*Ibid.*) Where a probationer fails to abide the conditions of his probation, the court may revoke probation and impose sentence. (*Rodriguez*, at p. 445; *People v. Hawkins* (1975) 44 Cal.App.3d 958, 968.)

In making the determination of whether to revoke probation, trial courts are afforded great discretion. (*Rodriguez*, *supra*, 51 Cal.3d at p. 445.) On appeal, we consider whether the order is arbitrary or capricious or exceeds the bounds of reason considering all of the facts and circumstances. (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831.) "'[O]nly in a very extreme case should an appellate court interfere with the discretion of the trial court in the matter of denying or revoking probation. [Citation.]'" (*Rodriguez,* at p. 443.)

Considering all of the facts and circumstances presented here, we cannot conclude that Judge Cowell's decision to revoke probation and sentence the appellant to state prison was arbitrary or capricious or exceeded the bounds of reason. Appellant's probation had been revoked and reinstated three times before for various violations, including "tagging" walls with gang-related graffiti, resisting arrest at a party, failing to update his address with the probation department and failing to appear at scheduled appointments with his probation officer. After his third probation violation, Judge Ito reminded appellant of the consequences of failing to regularly report for probation appointments. Notwithstanding this admonishment, appellant again failed to report.

Judge Cowell was fully aware of the facts and considered various alternatives, before deciding that return to probation was not appropriate. Is it possible that another judge with the same information might have reached a different result? The answer is obvious, as reasonable minds could differ in this case as to the proper course of action. But the fact that there were other alternatives available does not make a trial judge's decision to reject those alternatives an abuse of discretion.

In sum, appellant's repeated failure to adhere to the most basic terms of his probation supports Judge Cowell's conclusion that probation has failed as a rehabilitative device. Judge Cowell did not abuse his discretion in deciding he had "no alternative" but to revoke probation and impose the suspended prison sentence.

The judgment (order revoking probation) is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Michael A. Cowell, Judge
Superior Court County of Los Angeles

Donna Ford, under appointment by the Court of Appeal, for Appellant.

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